STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 19, 2007
v	No. 265188 Ingham Circuit Court
DAVID MICHAEL ROBINSON, Defendant-Appellant.	LC No. 04-001211-FH

Before: Saad, P.J., and Hoekstra and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right his conviction by a jury of insurance fraud, MCL 500.4511(1). The trial court sentenced him to 30 months' probation with 90 days in jail. We affirm.

I

Defendant first argues that the evidence submitted by the prosecution was insufficient to establish insurance fraud. We disagree.[1]

We review a challenge to the sufficiency of the evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). When reviewing a challenge to the sufficiency of the evidence, this Court views the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that all the elements of the crime were proved beyond a reasonable doubt. *People v Martin*, 271 Mich App 280, 340; 721 NW2d 815 (2006). "The standard is deferential and requires that this Court "'draw all reasonable inferences and make credibility choices in support of the jury verdict.'" *Id.*, quoting *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

[1] Defendant's argument is actually framed as a claim that the verdict was against the great weight of the evidence. However, defendant did not properly preserve this claim by moving for a new trial before the trial court. *Heshelman v Lombardi*, 183 Mich App 72, 83; 454 NW2d 603 (1990). In addition, defendant's argument clearly focuses on the sufficiency of the evidence. Therefore, we shall address this claim of error as a claim based on the sufficiency of the evidence.

A person who commits a fraudulent insurance act is guilty of a felony. MCL 500.4511(1).

> A fraudulent insurance act includes, but is not limited to, acts or omissions committed by any person who knowingly, and with an intent to injure, defraud, or deceive:
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> * * *
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> (c) Presents or causes to be presented to or by any insurer, any oral or written statement including computer-generated information as part of, or in support of, a claim for payment or other benefit pursuant to an insurance policy, knowing that the statement contains false information concerning any fact or thing material to the claim. [MCL 500.4503.]

Additionally, MCL 500.4501(h) defines "statement" to include "any notice statement, proof of loss, bill of lading, receipt for payment, invoice, account, estimate of property damages, bill for services, claim form, diagnosis, prescription, hospital or doctor record, X-rays, test result, or other evidence of loss, injury, or expense." Hence, in order to convict defendant of insurance fraud, the prosecution had to prove that defendant (1) presented a statement as part of, or in support of, a claim for payment pursuant to an insurance policy, (2) knowing that the statement contained false information concerning any fact or thing material to the claim, and (3) that the statement was made with the intent to injure, defraud or deceive.[2]

At trial the prosecution presented evidence that defendant filed a claim for benefits with AAA. In the claim, defendant stated that, in March 2002, a car insured by AAA struck him while he walked across a street. The prosecution also presented evidence that defendant made several statements in support of his claim against AAA. In these statements, defendant indicated that he had not worked, other than answering telephones for a local public television station, since the March 2002 accident. The evidence also indicated that defendant stated that he suffered injuries from the accident that made it difficult for him to work, including herniated discs that interfered with his ability to bend over and pick up heavy objects and a hand injury that prevented him from gripping tools. As a result, he claimed that he could not work. In contradiction to these statements, the prosecution presented testimony and video evidence that defendant had in fact worked in construction after the accident and was not physically limited in the ways he alleged. Indeed, one video showed defendant lifting heavy lumber, using a hammer and pry bar, and squatting and kneeling while working on a deck.

Viewing this evidence in the light most favorable to the prosecution, a rational trier of fact could conclude that the prosecutor proved every element of insurance fraud beyond a reasonable doubt. The evidence clearly demonstrated that defendant made a claim for benefits from AAA. The evidence also indicated that defendant made several statements about his work

[2] We reject defendant's contention that the prosecution had to prove that the insurance company relied on defendant's false statements by paying the claim. Under the plain statutory language, it is sufficient that the defendant knowingly made the false statements with the intent to defraud.

history and physical abilities since the accident. These statements are directly relevant to whether and to what extent defendant's claims should be paid. Therefore, they are material to the claim. Further, the prosecution presented testimony and compelling video evidence that defendant's statements concerning his work history and ability to work were false. Based on this evidence, a rational trier of fact could conclude that defendant made the statements knowing that they were false and with the intent to defraud AAA. Therefore, there was sufficient evidence from which a rational trier of fact could conclude that the prosecution had proved each element of the offense.

Notwithstanding this, defendant contends that the evidence presented by the prosecution was legally insufficient to establish that his statements were false. Specifically, defendant argues that, because there was no evidence that he received compensation for the labor he performed after the accident, the labor he performed did not necessarily constitute "work." Therefore, his statements that he did not work may have been accurate. He also notes that his statements concerning his ability to work were qualified. That is, he asserts that he did not state that he could never perform the activities, but only that he was generally unable to perform the activities. As a result, defendant argues, the video evidence of him working for a short period of time did not necessarily contradict his statements concerning his general ability to work. These arguments are unavailing. The circumstances under which the statements were made and whether they were technically accurate is a matter of weight and credibility for the trier of fact. See *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999) (noting that a jury "is free to believe or disbelieve, in whole or in part, any of the evidence presented."); *People v Marji*, 180 Mich App 525, 542; 447 NW2d 835 (1989) (stating that where "the testimony given is conflicting, it is for the jury to decide what weight to assess to the evidence."). This Court will not second-guess the jury's assessment of weight and credibility. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992).

Finally, defendant claims that his statements were merely opinions that are incapable of constituting fraud. We do not agree. Defendant made the statements at issue in response to requests for information related to processing his claim for benefits. Each of the statements, however qualified, was offered as a statement of fact.

There was sufficient evidence to support defendant's conviction.

II

Defendant next claims that the trial court denied him a fair trial through several erroneous rulings. We note that defendant failed to properly set out the majority of these issues in his statement of the questions presented. MCR 7.212(C)(5). Further, defendant's analysis of these claims of error is cursory and without proper citation to the record and supporting authorities. Therefore, we conclude that these claims of error were abandoned on appeal. See *Martin*, *supra* at 315. Nevertheless, we shall briefly address each claim of error.

Defendant argues that the trial court erred when it provided only $25 for obtaining defendant's medical records and refused to permit defendant to have a medical expert testify about plaintiff's injuries. At defendant's request, the trial court granted defendant $25 in order to pay for a copy of his medical records. Defendant did not object to the amount. Furthermore, defendant specifically requested funds to hire an occupational therapist to testify as an expert

witness, which the trial court granted. The record does not indicate that defendant ever objected to the trial court's actions or requested additional funds or experts. Because the trial court cannot be faulted for refusing to grant motions that were never made, we must conclude that there was no error.

Defendant next argues that the trial court erred when it prevented defendant from testifying about his understanding of his own injuries. However, the trial court did not prevent defendant from testifying about his injuries, but rather prevented defendant from offering technical testimony concerning his diagnosis and medical condition. Because defendant was not offered as an expert witness with respect to spinal injuries and diagnosis, his testimony on those subjects would have been improper. See MRE 701 and 702. Thus, the trial court did not abuse its discretion in refusing to let defendant offer medical testimony about his injuries and diagnosis.

Defendant also argues that his former attorney should not have been permitted to testify because his testimony was privileged, irrelevant and prejudicial. Defendant did not object to his former attorney's testimony on any of these bases. Therefore, this claim of error is unpreserved. We review unpreserved errors for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). At trial, defendant's former attorney testified that he represented defendant in a civil suit against AAA, but that he withdrew from representing defendant after he saw the video evidence of defendant working. Even if this evidence were improperly admitted, any prejudice caused by the testimony was minimal and harmless in light of the evidence against defendant. Therefore, it does not warrant relief. *Id.*

Defendant next argues that two lay witnesses were improperly allowed to offer testimony beyond the limits imposed by MRE 701. Specifically, defendant contends that the investigator who took the videos should not have been permitted to comment on defendant's physical condition as it appeared in the videos and that the attorney for AAA should not have been permitted to characterize defendant's lawsuit as frivolous. However, we conclude that the investigator's testimony was largely descriptive of the events occurring on the videotape and was rationally based on his perception and helpful to a clear understanding of the witness' testimony. See MRE 701. Furthermore, to the extent that the investigator described defendant's physical condition as it appeared during the period of the videotaping, those comments were not improper. See *New York Life Ins Co v Newman*, 311 Mich 368, 375; 18 NW2d 859 (1945). Finally, the attorney for AAA did not need to be qualified as an expert to testify concerning his opinion about the merits of defendant's claim in the underlying suit. See MRE 701.

III

Next, defendant argues that the prosecution improperly argued facts not in evidence. Defendant did not properly preserve these claims of error by objection before the trial court. Therefore, we shall review this claim for plain error affecting defendant's substantial rights. *Carines*, *supra* at 763.

"A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence in the case." *People v Fisher*, 193 Mich App 284, 291; 483 NW2d 452 (1992). However, a prosecutor may "argue all reasonable inferences from the evidence relating to the prosecution's theory of the case." *People v Matuszak*, 263 Mich App 42, 53; 687 NW2d 342

(2004). "The prosecutor's comments must be considered as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial." *Schultz, supra* at 710.

Defendant contends that the prosecutor committed misconduct when he told the jury in his opening remarks that defendant stated that he had not worked at all since the accident, that he had not performed work for Nicholas Creemer, and that he could not use his hand. We disagree with each contention.

In a proceeding related to his claim for benefits, defendant was asked if he had "done any work of any kind, whether employment work or otherwise, since this accident?" To which he responded, "Other than, you know, maintenance, like, I mean, household chores. No." In addition, the jury was presented with evidence that, in sworn testimony taken in December 2002, defendant testified that he "can't use [his] right hand," and "can't hold anything." Hence, there was evidence to support each statement made by the prosecutor.

Next, defendant argues that the prosecutor erred when he stated that defendant previously testified that he was totally disabled. The prosecutor did state that defendant's "entire representation from day one was a total disability" and that defendant's "claim was for total disability." However, the prosecutor did not state that defendant "testified" that he was totally disabled. Further, the prosecutor's statements that defendant "represented" that his claim was for total disability was accurate in light of the fact that he sought full wage benefits for an inability to work. Therefore, the evidence supported this statement. Finally, the prosecution's statements concerning defendant's affidavit and whether defendant "scammed" his former attorney were simply arguments based on reasonable inferences from the evidence. Therefore, they were not improper. *Matuszak, supra* at 53.

IV

Defendant next argues that defense counsel was constitutionally ineffective. We disagree. Because an evidentiary hearing was not held, our review of this claim is limited to mistakes apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

A criminal defendant has the right to the effective assistance of counsel. *Strickland v Washington*, 466 US 668, 696; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996). When evaluating a claim of ineffective assistance of counsel under either the Sixth Amendment of the United States Constitution, or under the equivalent provision of the Michigan Constitution, Michigan courts must examine the standards established in *Strickland*, *supra* at 687. *People v Hoag*, 460 Mich 1, 5; 594 NW2d 57 (1999), citing *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). To establish ineffective assistance of counsel, the defendant must first show: (1) that counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms; and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). That is, defendant must show that counsel's error was so serious that the defendant was deprived of a fair trial, i.e., the result was unreliable. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

Defendant argues that defense counsel was ineffective for failing to obtain and present defendant's medical records and for failing to call a medical expert who could testify about defendant's condition. Decisions regarding the presentation of evidence and "whether to call or question witnesses are presumed to be matters of trial strategy." *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). Furthermore, in order to establish the predicate for his claim, defendant must offer proof that an expert would have testified favorably if called for the defense. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). Defendant does not specifically state what the records would show or how the experts would testify. Instead, defendant merely suggests that the evidence and testimony would have demonstrated that defendant could not work. However, it is unclear how this evidence would have refuted the strong video evidence and testimony that established that defendant did in fact work during the relevant period. In addition, defendant's trial counsel did present an expert that testified that defendant was suffering from disability and that the video of him working was consistent with defendant's statements concerning his abilities. Therefore, on this record, we cannot conclude that defendant's trial counsel's decision was anything other than reasonable trial strategy. See *Garza*, *supra* at 255.

Defendant next argues that defense counsel failed to properly impeach several prosecution witnesses. However, defendant fails to state with specificity how the witnesses should have been impeached and does not state how the impeachment would have altered the outcome of his trial. Further, on review of the record, we conclude that defendant's trial counsel did in fact examine the witnesses and attempt to expose inconsistencies in their testimony and potential biases. Therefore, there is no record support for defendant's claim that his trial counsel failed to properly impeach these witnesses. Likewise, defense counsel did not err by not inquiring into whether defendant's ex-wife informed AAA about when and where defendant would be working. How AAA became aware of defendant's activities is not pertinent to whether the activities actually occurred. Therefore, on this record, we cannot conclude that defendant's trial counsel was ineffective for failing to impeach the prosecution's witnesses.

Defendant next argues that his trial counsel was ineffective for failing to object to the lay witness comments concerning what was depicted on the videotapes of defendant performing construction work and for failing to object to the testimony that defendant's underlying suit was "frivolous." However, we have already determined that these comments were proper. Because trial counsel is not required to advocate a meritless position, the failure to object to these cannot constitute the ineffective assistance of counsel. *Riley*, *supra* at 142.

V

Next, defendant contends that the trial court abused its discretion when it denied his motion to compel discovery of certain medical records, various telephone records and transcripts of his child custody case. Defendant also claims that the trial court abused its discretion when it refused to adjourn the trial. We disagree with each contention.

This Court reviews a trial court's decision regarding a motion for discovery for an abuse of discretion. *People v Phillips*, 468 Mich 583, 587; 663 NW2d 463 (2003). We also review a trial court's decision regarding a motion for continuance for an abuse of discretion. *People v Jackson*, 467 Mich 272, 276; 650 NW2d 665 (2002). An abuse of discretion occurs when a court

selects an outcome that is not within the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

Defendant moved the trial court to compel the production of the telephone records of AAA's attorney, defendant's ex-wife and her new husband, Thomas Metts, Nick Creemers and Don Brooks. Defendant also requested copies of Creemers' medical records, Don Brooks' investigation records, and transcripts of his child custody case with his ex-wife. The trial court ordered the prosecution to release Don Brooks' investigation records, but in all other respects the motion was denied. Defendant now argues that the trial court should have granted this request in order to allow him to demonstrate whether his ex-wife was providing information to those involved in the insurance fraud case.

MCR 6.201 governs criminal discovery. *Phillips*, *supra* at 587. Either the subject of discovery must be set forth in the rule or the party seeking discovery must show good cause why the trial court should order the requested discovery. *Id.* at 591-593. Defendant cites no authority under MCR 6.201, nor did he demonstrate good cause, to support his argument that the records should be disclosed. Furthermore, whether defendant's ex-wife assisted with the investigation is irrelevant and unhelpful to the resolution of the issues at trial. Therefore, we cannot conclude that the trial court's decision amounted to an abuse of discretion.

Nor did the trial court err in denying defendant's request for a continuance on the second day of trial. In order to invoke a trial court's discretion to grant a continuance, the defendant must show both good cause and due diligence. *People v Coy*, 258 Mich App 1, 18; 669 NW2d 831 (2003). Defendant did not establish good cause for an adjournment. Further, defendant failed to present any evidence that he was prejudiced by a failure to grant a continuance. Therefore, any error in failing to grant a continuance would not warrant relief. *Id.* at 18-19.

VI

Finally, defendant argues that the trial court erred in ordering restitution. We disagree. Defendant argued at sentencing that the costs incurred by AAA in defending against defendant's underlying lawsuit were not subject to restitution. However, he did not contest the accuracy of the amount of restitution awarded and did not object to the trial court's failure to directly cite documentary support for the award. Thus, these portions of defendant's argument are not preserved for review. A trial court's order of restitution is generally reviewed for an abuse of discretion. *In re McEvoy*, 267 Mich App 55, 59; 704 NW2d 78 (2005). A trial court's factual findings are reviewed for clear error. *People v Zahn*, 234 Mich App 438, 445; 594 NW2d 120 (1999). The trial court's interpretation of the Crime Victim's Rights Act is reviewed de novo. *People v Law*, 459 Mich 419, 423; 591 NW2d 20 (1999).

Under MCL 780.766(2), "when sentencing a defendant convicted of a crime, the court shall order . . . that the defendant make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction or to the victim's estate." "[I]n determining the amount of restitution to order under [MCL 780.766], the court shall consider the amount of the loss sustained by any victim as a result of the offense." MCL 780.767(1). A "victim" is further defined as "an individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime," and "includes a sole proprietorship, partnership, corporation, association, governmental entity, or any other legal entity that suffers direct physical

or financial harm as a result of a crime." MCL 780.766(1). Thus, AAA is an eligible "victim" under the statute.

With respect to proving the amount of restitution in an individual case, MCL 780.767(4) provides:

> Any dispute as to the proper amount or type of restitution shall be resolved by the court by a preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the prosecuting attorney.

Finally, the court must "disclose to both the defendant and the prosecuting attorney all portions of the presentence or other report pertaining" to its determination of the amount of restitution to order. MCL 780.767(3).

Defendant first argues that the $6,633.74 awarded as restitution was for general investigative work unrelated to the alleged fraud and, therefore, could not be recovered under *People v Crigler*, 244 Mich App 420; 625 NW2d 424 (2001). We do not agree that *Crigler* stands for that proposition. In *Crigler*, the Court examined whether a law enforcement agency could recover the loss of the money used to make a drug purchase. In differentiating the lost money from normal investigative expenses, the Court noted that,

> The payment of salaries and overtime pay to the investigators, the purchase of surveillance equipment, the purchase and maintenance of vehicles, and other similar expenditures are "costs of investigation" unrelated to a particular defendant's criminal transaction. These expenditures would occur whether or not a particular defendant was found to be engaged in the sale of controlled substances. [*Id.* at 427.]

The Court concluded that lost buy money was unlike general investigative costs in that it directly arises out of the course of the criminal conduct. Therefore, the trial court could order restitution of the lost buy money. *Id.* Unlike the case in *Crigler*, the present case involves a private investigation instituted when defendant made claims, which AAA suspected were fraudulent. Hence, these costs are not related to a law enforcement agency's ongoing duty to investigate crime. Further, because these costs are a direct result of the acts giving rise to the criminal charges, they are costs arising out of defendant's criminal course of conduct. Therefore, the trial court could properly order restitution for these costs.

Defendant also points out that, other than a conclusion that AAA reported $12,876.24 in legal fees and expenses, the presentence report cites no factual itemization of AAA's costs. Defendant argues that the trial court's failure to cite any source to support this figure constitutes error warranting reversal of the restitution order.

Here defense counsel noted that the $6,000 figure paid in defending the underlying suit by defendant represented "costs for depositions, private investigator, and obtaining medical records." We agree with plaintiff that this figure represented "losses attributable to the illegal scheme" that culminated in defendant's conviction. *People v Gahan*, 456 Mich 264, 272; 571 NW2d 503 (1997). Although defendant argues that the trial court did not cite any documentation

to support its award, plaintiff indicates that it submitted to the trial court a victim impact statement from AAA. The printouts of the legal expenses attached to this statement itemize the expenses incurred in investigating and defending against defendant's civil suits. Defendant did not deny this statement was submitted to the trial court. Although the transcript of the sentencing hearing does not indicate that the trial court ever directly referenced the printouts, it does not appear that the $6,633.74 was ever disputed as inaccurate. In fact, defense counsel stated that, "[t]he other 6,000 and some dollars paid in defending this suit, I guess I would say that's costs for depositions, private investigator and obtaining medical records." In light of the information on the record, the trial court did not err in ordering restitution for the costs of defending defendant's civil suit.

There were no errors warranting relief.

Affirmed.

/s/ Henry William Saad
/s/ Joel P. Hoekstra
/s/ Michael R. Smolenski